IN THE

Supreme Court of the United States

October Term, 1943.

No. 1061

PRESQUE-ISLE TRANSPORTATION CO.,
a corporation,
Defendant-Petitioner,

against

CARL KOEHLER,
Plaintiff-Respondent.

BRIEF OPPOSING PETITION FOR CERTIORARI.

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Statement and Facts.

Respondent, a seaman on petitioner's Steamship "Angeline," a Great Lakes freighter, was viciously assaulted by one Todd, a fellow wheelsman, on November 21st, 1940, while on board the vessel, then lying at an ore dock at Buffalo. On October 20, 1940, while the vessel was at Milwaukee, Todd had assaulted another seaman in the presence of the second mate, so Todd's vicious nature was known to the vessel's officers.

Shortly before the assault in question the third mate had witnessed an assault by Todd on respondent and had told respondent to go ashore "until this blows over." The second mate having been told of this assault was working on the deck in the vicinity of the ship's ladder where Todd was waiting for respondent to return and the jury could, and probably did, infer that he saw Todd and doubtless surmised his purpose.

The vessel's officers took no steps to protect respondent from the impending assault, but after Todd had knocked down respondent and was kicking him, the second mate intervened.

Record, pp. 7-20 and 50-63.

Respondent sued under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, in the District Court for Western New York. The Court submitted the case to the jury for a general verdict and also submitted to it three special questions, viz.:

> "1. Was Todd of a vicious and belligerent nature and likely to inflict bodily harm upon other members of the crew?
>
> "2. If so, was that fact known to the officers of the ship, or should it have been known to them in the exercise of ordinary diligence?
>
> "3. Was Plaintiff's physical condition as revealed by the hospital record at Cleveland, the natural result of the injuries he received in the fight on the ship?"
>
> *Record*, pp. 124-125.

The jury returned a general verdict for respondent for $3,000, and answered all three questions in the affirmative (p. 127).

Petitioner appealed from the judgment (pp. 132-133); and the Court of Appeals for the Second Circuit unanimously affirmed. The opinion will be found at pp. 141-144 of the Record and is reported in 141 Fed. 2d., at page 490.

Circuit Judge Frank, for the Court, sets forth the facts quite fully, and said that the word "negligence," as used in the Jones Act, "must be given a liberal interpretation"; "that it includes any knowing or careless breach of any obligation which the employer owes to the seamen," among which "is that of seeing to the safety of the crew"; that "there is no such safety if one of the crew is a person having the character of Todd"; and that "consequently, the defendant is liable here because the ship's officers knew, or with ordinary diligence, should have known what Todd was like." Judge Frank further said that "in such circumstances, it is not material that Todd, when he assaulted plaintiff, was not acting in the course of his employment or in the interest of defendant."

Petitioner now petitions for certiorari.

ARGUMENT.

POINT I.

Petitioner was negligent within the Purview of the Jones Act.

The verdict of the jury, based upon substantial evidence, established these facts, viz.:

1. That petitioner failed in its duty to keep its vessel in a seaworthy condition by reason of the negligence of the vessel's officers in continuing the employment as a seaman of Todd, whose vicious and belligerent nature and

likelihood to inflict bodily harm upon other members of the crew was known to them;

2. That petitioner failed in its duty to protect and safeguard respondent in his employment by reason of the negligence of the vessel's officers in not protecting respondent from the assault by Todd, which they had every reason to anticipate.

3. That by reason of petitioner's failure in the respects aforesaid respondent was seriously injured.

These facts were a sufficient showing of negligence by petitioner under the Jones Act.

Jacob v. New York, 315 U. S. 752, 755.

In order to be seaworthy a ship must have a competent master and a competent crew, and the Court of Appeals for the Ninth Circuit, prior to the enactment of the Jones Act, held that a ship was not properly equipped for a voyage where the mate was a man known to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors.

The Rolph, 299 Fed. 52; cert. den. 266 U. S. 614.

It follows that where the ship's officers retain a seaman known to them to be of such a character they are negligent in their duty to maintain the ship in a seaworthy condition; such negligence is imputed to the owner by the Jones Act.

In *Jamison v. Encarnacion*, 281 U. S. 635, this Court said, p. 640, that the Federal Employers' Liability Act, incorporated in the maritime law by the Jones Act, "is intended to stimulate carriers to greater diligence for the safety of

their employees," and held that "it is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word [negligence] may be read to include all the meanings given to it by courts and within the word as ordinarily used"; and, p. 641, that "as unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the Act."

In *Sundberg v. Washington Fish & Oyster Co.*, 138 Fed. 2d. 801, the Court of Appeals for the Ninth Circuit followed the definition of "negligence" given in *Jamison v. Encarnacion, supra,* and held, where a seaman on a motorship was injured by a fellow seaman shooting at sea lions for amusement, of which practice the master knew, that it was for the jury to determine whether the master "should reasonably have anticipated the danger of bodily injury to a member of the crew," and hence whether, on the part of the shipowner, there was negligence under the Jones Act.

POINT II.

The cases in this Court relied upon by petitioner are not applicable.

The Court of Appeals well said:

> "In so far as *Davis v. Green*, 260 U. S. 349, and *Atlantic Coast Line R. R. v. Southwell*, 275 U. S. 64, indicate a contrary conclusion as to an ordinary employee, they are not in point since the obligations of a ship owner for the safety of seamen is substantially greater than that of ordinary employers."
>
> Record, p. 144.

In a very recent case this Court summarized the duty of petitioner to respondent as follows:

> "We have often had occasion to emphasize the conditions of the seaman's employment, see *Socony-Vacuum Co. v. Smith, supra*, [305 U. S. 424] 430-431 and cases cited, which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers."
>
> *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 103.

POINT III.

The Petition should be denied.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THOMAS C. BURKE,
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